

Nos. 10956 and 10984

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KINNER MOTORS, INC., RESPONDENT

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*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD*

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**PETITION OF THE NATIONAL LABOR RELATIONS BOARD  
FOR REHEARING**

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PAUL F. O'BRIEN,  
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## **PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING**

*To the Honorable, the Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

Comes now the National Labor Relations Board, petitioner herein, and respectfully petitions this Court for a rehearing in the above-entitled causes. In support of this petition, the Board respectfully shows as follows:

1. On July 22, 1944, the Board issued its decision in No. 10956, in which it found that respondent had dominated, interfered with, and supported a labor organization among its employees in violation of Sec-

tion 8 (1) and (2) of the Act (R. I, 34, 36). On December 13, 1944, the Board issued a second decision, in No. 10984, in which it found that respondent had discharged two employees because of their union membership and activities, in violation of Section 8 (1) and (3) of the Act, and that it had discharged a third employee both because of his union membership and because he had testified against respondent in the first case, in violation of Section 8 (1), (3), and (4) of the Act (R. II, 35, 46). In each case, the Board ordered respondent to cease and desist from unfair labor practices of the specific type found. Since it found that respondent's violations of Section 8 (2), (3), and (4), constituted violations of Section 8 (1), it directed respondent, in paragraph 1 (c) of the order in each case, to cease and desist from "in any other manner" interfering with the rights of its employees guaranteed in Section 7 of the Act (R. I, 19; II, 17).

On petition by the Board for enforcement of its order in each case, this Court issued its decision on December 29, 1945 which, as later amended, required elimination of paragraph 1 (c) from both orders. In directing this modification, the Court relied on certain quoted language of the Supreme Court in *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426. In addition, the Court stated that "in *May Department Stores Co. v. N. L. R. B.*, — U. S. — (1945), it [the Supreme Court] held that an omnibus cease and desist order will not be approved unless there is a 'clear determination by the Board of an attitude of opposition to the purposes of the Act to protect the rights of employees generally.' "

2. For reasons more fully stated in our petition for rehearing in *N. L. R. B. v. Van De Kamp's Holland Dutch Bakers, Inc.*, No. 10949, filed together with this petition and made a part hereof, we submit (a) that the Court's action in striking paragraph 1 (c) entirely is in direct conflict with the square holding of the Supreme Court in the *Express* and *May* cases; and (b) that enforcement of the Board's order without modification is warranted in this case under the rules laid down in those two cases.

Specifically, respondent's violations of Section 8 (2) (3), and (4) of the Act fully meet the test laid down in the *Express* case, since they constitute "persistent attempts by varying methods to interfere with the right of self-organization," 312 U. S., at page 438. Indeed, there could hardly be a clearer demonstration of respondent's wanton disregard of the law than its discharge of an employee because he gave testimony before the Board (R. II, 35).

3. If the Board's orders are modified as directed in the Court's opinion, the decree of this Court will not be available to the Board even if respondent threatens to commit the very illegal acts it is now enjoined from committing. Thus it could threaten to discharge any employee who engaged in union activity; it could effectively prevent the giving of testimony by employees at Board hearings by threatening to discharge them if they did so. No clearer form of coercion can be imagined. We cannot conceive it to be the intention of this Court thus to withhold the summary procedure provided by statute for restraint of such conduct and to force the Board, if respondent persists in



its illegal efforts, again to resort to the lengthy procedure of filing of charge, issuance of complaint, hearing before a Trial Examiner, Intermediate Report, Decision and Order, Petition for Enforcement, and ultimate decree, all of which Congress sought to make unnecessary in respect to employers whose prior illegal conduct in that respect has resulted in a court-enforced Board order.

Wherefore, it is prayed that a rehearing in these cases be granted, and that on such rehearing the orders of the Board be enforced in full. In the alternative, it is prayed that this Court withhold action on this petition for rehearing until the Supreme Court issues its decision in *N. L. R. B. v. Cheney California Lumber Co.*, 149 F. 2d 333 (C. C. A. 9), certiorari granted, — S. Ct. —, October 1945 Term, No. 319.

Respectfully submitted.

A. NORMAN SOMERS,  
*Assistant General Counsel,*  
*National Labor Relations Board.*

JANUARY 1946.

#### CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith, and not for the purposes of delay.

A. Norman Somers,  
 A. NORMAN SOMERS,  
*Assistant General Counsel,*  
*National Labor Relations Board.*

JANUARY 1946.